IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1504

BENNO P. LUDWIG, AS ADMINISTRATOR OF THE ESTATE OF DEAN E. CANE, DECEASED,

Respondent,

vs.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Petitioner, Massachusetts Mutual Life Insurance Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on October 17, 1975, rehearing denied on January 23, 1976.

OPINIONS BELOW.

The Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois entered on October 8, 1974 is unreported in the official reports but appears in the Appendix to this Petition. (A.17) The Opinion of the United States Court of Appeals for the Seventh Circuit is reported at 524 F.2d 376 (7th Cir. 1975) and appears, also, in the Appendix to this Petition. (A.3)

JURISDICTION.

The judgment of the Court of Appeals was entered on October 17, 1975. A timely Petition for Rehearing En Banc was denied on January 23, 1976, and this Petition for a Writ of Certiorari is filed within 90 days of that date. Jurisdiction is conferred upon this Court by Title 18, United States Code § 1254(1).

QUESTIONS PRESENTED.

I. Was a cross-appeal necessary to permit an appellee, the successful party in the district court, to support the judgment of the district court on a theory of applicable state law which the district court had erroneously failed to adopt.

II. Does the Illinois rule on conflict of laws in life policy litigation require the application of the "most significant contacts" approach, instead of the rigid "place of making" rule which was applied by both the district court and the Seventh Circuit in making Michigan law applicable to a case wherein Illinois is the state where every significant contact exists.

III. Is an insured who was killed when he walked in the path of a mail freight train "a passenger in or upon a public conveyance then being operated by a common carrier to transport passengers for hire" as held by a two-to-one decision of the Seventh Circuit Court of Appeals?

STATEMENT OF THE CASE.

In the fall of 1970, while he was a resident of Michigan, Dean E. Cane, the deceased insured, applied for and received a policy on his life from petitioner Massachusetts Mutual Life Insurance Company. The first premium was paid in October, 1970 while the insured was still residing in Michigan. Sometime subsequent to the payment of the first premium but prior to July 26, 1972, the insured moved to Illinois, and on July 26, 1972, the insured, while residing in Illinois, changed the beneficiary on the life policy to his estate, now represented by Respondent as Illinois administrator of the estate of Dean E. Cane.

On August 2, 1972, the insured, then a resident of Illinois, was struck and killed by a westbound mail freight train while crossing the tracks in Lisle, Illinois intending later to board an eastbound commuter train which had not yet arrived at the station. As a result of Probate proceedings in Illinois, Respondent was appointed Administrator of decedent's estate, and Petitioner paid a total of $42,473.15 to the insured's Estate as beneficiary of the policy in question, after investigating the facts of the insured's death and determining that the beneficiary was entitled to the face amount of $20,000 plus an additional $20,000 benefit under the Accidental Death Benefit Agreement.

The Respondent filed suit in the United States District Court for the Northern District of Illinois based upon diversity jurisdiction, claiming that the estate was entitled to yet a third $20,000 benefit under that portion of the Accidental Death Agreement:

> If such death was the result of an injury sustained *while the insured was a passenger in or upon a public conveyance then being operated by a common carrier to transport passengers for hire* the amount which otherwise may be payable under this agreement will be doubled. [Emphasis added.]

The district court looked to the Illinois conflict of laws rules to determine whether Michigan or Illinois law would apply in interpreting the life policy involved. That court rejected the insurer's argument that the law of the place with the "most significant relationship" would govern and, instead, applied the law of Michigan, the place of the making of the contract. However, the district court then distinguished the only Michigan case which had been cited and granted summary judgment in favor of the insurer based upon "reason and logic, with some assistance from other Courts which have faced similar problems." (A.20) The district court's decision was based upon its finding that the insured's death did not occur while he was "a passenger in or upon a public conveyance."

On appeal to the Court of Appeals, the Respondent argued that the district court had properly determined to apply the law of Michigan, but contended that the district court had erred only in distinguishing the one Michigan case presented to it and in finding, as a matter of law, that the insured was not killed while "a passenger in or upon a public conveyance." The Petitioner contended that the district court had improperly decided the conflict of laws question but that its decision was correct, nevertheless, under either the appropriate Illinois law or under Michigan law.

The Seventh Circuit, however, refused to decide the conflict of laws issue on the erroneous assumption that such issue should have been raised by the insurer by way of cross appeal and, therefore, merely adopted the district court's theory that the law of Michigan applied to the facts involved. (A.6) The Court, with one dissent, then determined that, under Michigan law, the insured was "a passenger in or upon a public conveyance" at the time he, as a pedestrian, was struck and killed by a mail freight train and that his estate was entitled to a third $20,000 benefit.

REASONS FOR GRANTING THE WRIT.

Although the district court properly entered judgment in favor of the Petitioner on the facts of the case, that court erred in determining that the law of Michigan, the place of the making of the life insurance contract, should govern rather than the law of Illinois, the state with the most significant contacts. And the Seventh Circuit aggravated that error when, because there was no cross-appeal, it reversed the district court's judgment on the basis of Michigan law without first deciding the petitioner's contention that the law of Illinois, not the law of Michigan, should be applied. Cases in this Court uniformly hold that no cross-appeal was necessary to permit the appellee in the Court of Appeals, now the Petitioner, to support the judgment of the district court on the ground that the district court should have applied Illinois law instead of Michigan law.

While it is true that the weight of authority has been that the validity, interpretation, and construction of a life insurance contract are governed by the law of the place where that contract is made, that rule, based upon the now generally discredited vested rights theory of conflicts, is unsatisfactory. The trend, in Illinois and other states, is to adopt a more flexible approach which would allow the courts to inquire in each case as to which state has the most significant relationships with the event. This approach, which implies a functional or qualitative evaluation in each case, provides the courts with the flexibility necessary for the judicious handling of conflict of laws questions in life insurance cases. Cases in the Supreme Court of Illinois clearly indicate a preference for the "most significant contacts" doctrine.

Because life insurance contracts are usually multistate transactions resulting in much federal court litigation based upon diversity jurisdiction, enforcement of conflicts rules of the forum state is important and should be emphasized. Further, the accidental death provision here involved—namely, the com-

monly known 'non-occupational vehicle accidental death benefit' —is offered by a multitude of insurance companies to literally hundreds of thousands of people. Insurance companies are continually being exhorted to write their policies, this particular accidental death provision included, in unambiguous and understandable language. To the extent that the language here involved, "while a passenger *in or upon* a public conveyance then being operated by a common carrier to transport passengers for hire" and language similar in effect and intent are widely used in form life policies and have a wide applicability to much of the public which purchases life policies, it would be advantageous to both the general public and the judiciary to have a decision by this Court concerning its meaning.

I.

The Court of Appeals Erred in Refusing to Consider a Conflict of Laws Question and in Holding, Instead, That a Cross-Appeal by the Defendant, Which Had Been Successful in the District Court, Was Necessary to Permit the Defendant, as Appellee in the Court of Appeals, to Support the District Court's Judgment on a Theory Rejected by the District Court.

The life insurance policy in question provides, in addition to the $20,000 face value and $20,000 accidental death benefit, an additional $20,000 benefit if the insured dies "while a passenger in or upon a public conveyance then being operated by a common carrier to transport passengers for hire." On August 2, 1972, the insured, who had purchased a ticket to ride the Burlington Northern Railroad from Lisle, Illinois eastbound to Chicago, walked across the railroad tracks to the station platform to wait for his eastbound commuter train and was struck and killed, before the arrival of the commuter train, by a westbound mail freight train.

There was never any question but that the insured was not physically "in or upon" the train or that the mail freight train

was not "then being operated . . . to transport passengers for hire." The administrator of the insured's estate, however, contended that the insured did not have to be physically in or upon the commuter train in order to trigger payment of the additional $20,000 and cited to the district court the Michigan case of *Quinn* v. *New York Life Insurance Company*, 224 Mich. 641, 195 N.W. 427 (1923). Although the insurer argued to the district court that the law of the State of Illinois should govern because Illinois was the State which had the "most significant relationship" with the facts involved, the district court held that under Illinois law, the interpretation and construction of the life insurance policy should be governed by the law of the place of its making, namely, the law of the State of Michigan. Applying Michigan law, the trial judge, nevertheless, entered summary judgment for the Petitioner.

The Petitioner argued to the Seventh Circuit that although the district court had properly entered summary judgment in the insurer's favor, the district court had applied an improper conflict of laws doctrine thereby resulting in the erroneous application of Michigan, rather than Illinois, law. However, the Court of Appeals, in a footnote to its decision, stated:

> Insurer is content with the District Court's analysis and reading of the Michigan law as dictating the grant of the summary judgment in its favor; however, asserts that the District Court in the first instance erred in considering Michigan law as guiding the interpretation and construction of the insurance contract provisions in lieu of the law of the State of Illinois. Insurer cites *Ingersoll* at 49 and *P. S. & E.*, at 127 as establishing the Illinois' conflict of laws doctrine which directs the selection of the state holding the "most significant contacts" in the relationship among the parties as the state whose law should govern the substantive contractual rights and duties of the parties.
>
> We note that the District Court fully considered the contention and flatly rejected it. *Insurer does not cross appeal on any assertion of error, so we do not reach the issue nor express any opinion on the effect of the tort*

> *claim conflicts of law doctrine enunciated in Ingersoll and considered in P. S. & E. We adopt the District Court's conclusion to apply the law of Michigan as the law of this case.* The District Court aptly distinguished the facts in *P. S. & E.* from those of this case which conclusively establish the place of making the policy and rightfully, we believe, concluded *P. S. & E.* to be inapposite. [Emphasis added.] [A. 6]

In holding that the Petitioner, an appellee urging affirmance of the district court's judgment, was required to cross-appeal from that judgment in order to question the reasoning of the district court, the Seventh Circuit misconstrued a basic tenet of appellate procedure. The Petitioner, as an appellee, was privileged to argue on appeal all points in support of the district court judgment, including the point that the judgment could be supported by Illinois law which the district court erroneously refused to apply. See *United States* v. *American Railway Express Co.*, 265 U.S. 425 (1924), wherein Mr. Justice Brandeis stated for a unanimous Court (p. 435);

> . . . [A] party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attach the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. But *it is likewise settled that an appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.* [Emphasis added.]

A long line of subsequent cases in this Court has cited this decision with approval, and as recently as April 20, 1970, this Court expressly approved and quoted the above language of Mr. Justice Brandeis in *Dandridge* v. *Williams*, 397 U.S. 491 (1970). To the same effect, see *United States ex rel. Stachulak* v. *Coughlin*, 520 F.2d 931 (7th Cir. 1975).

Here, the Petitioner did not raise the conflict of laws issue in the Seventh Circuit to either enlarge its own rights or to lessen the rights of the Respondent but sought only to affirm the district court's judgment in all respects as entered by that court. The applicability of Illinois law was a matter of record, and the Seventh Circuit was required, without a cross-appeal, to consider whether, even though the decision by the district court to apply Michigan law was erroneous, a valid basis for the entry of summary judgment existed in the record. Had the Seventh Circuit reviewed the conflict of laws issue, it should have determined that Illinois requires the application of the "most significant contacts" approach, in both tort and contracts cases, and that, under such approach, Illinois law would govern the facts at bar and would support the district court's entry of summary judgment in favor of the Petitioner. Therefore, it was error for the Seventh Circuit to refuse to review the propriety of the district court's application of Michigan law.

II.

Illinois Law Requires the Application of the "Most Significant Contacts" Doctrine of Conflict of Laws Rather Than the Rigid "Place of Making" Rule in Determining the Applicable Law and Requires the Reversal of the Judgment of the Court of Appeals and Affirmance of the District Court's Entry of Summary Jugment in Favor of the Petitioner Even Though the District Court Erroneously Applied the "Place of Making" Rule.

If the Seventh Circuit had reviewed the conflict of laws issue, it would have determined that Illinois requires the application of the "most significant contacts" approach for both tort and contract cases and that under such approach, Illinois law would govern the facts at bar. A federal district court, when deciding questions of conflict of laws, must follow the rules prevailing in the states in which they sit. *Klaxon Co.* v.

Stentor Electric Manufacturing Co., 313 U.S. 487 (1941). And recent Illinois decisions indicate that the choice of law depends upon which state has the "most significant contacts" with the situation before the Court. *Ingersoll* v. *Klein*, 46 Ill.2d 42, 262 N.E.2d 593 (1970)

Although the *Ingersoll* case cited above involves a tort claim, the general language of the Court in rejecting the vested rights doctrine indicates that the highest tribunal in Illinois would apply the "most significant contacts" approach in contract cases as well. In *Ingersoll*, the court stated, at 46 Ill.2d 45-46:

> . . . In *Babcock* v. *Jackson* (1963), 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279, the court in considering the doctrine [of lex loci delicti], stated:
>
> . . . the vested rights doctrine has long since been discredited because it fails to take account of underlying policy considerations in evaluating the significance to be ascribed to the circumstance that an act had a foreign situs in determining the rights and liabilities which arise out of that act. 'The vice of the vested rights theory,' it has been aptly stated, 'is that it affects to decide concrete cases upon generalities which do not state the practical considerations involved' [Citation omitted.] More particularly, as applied to torts, the theory ignores the interest which jurisdictions other than that where the tort occurred may have in the resolution of particular issues. It is for this very reason that, despite the advantages of certainty, ease of application and predictability which it affords [citation omitted], there has in recent years been increasing criticism of the traditional rule by commentators and a judicial trend toward its abandonment or modification."

By approvingly citing this language of the *Babcock* case, the Illinois Supreme Court indicated that the *lex loci delecti* doctrine, while particularly criticized as applied to torts, was also discredited in general.

The Seventh Circuit has previously held that since the Illinois Supreme Court had adopted the "most significant contacts" test for tort cases, there is a presumption that the Illinois courts

would logically apply the same test in a contract action. In *P. S. & E. Inc.* v. *Selastomer Detroit, Inc.*, 470 F.2d 125 (7th Cir. 1972), the court stated, at page 127:

> . . . We can only presume that if faced with this problem in view of its prior contract law and analogous modern tort cases relying upon the "most significant contacts" rule, Illinois courts would probably find here that Illinois had the most significant contacts, and that its law would govern. [Citation of *Ingersoll* v. *Klein*, 46 Ill.2d 42, 262 N.E. 2d 593 (1970)]

And in *Wilhoite* v. *Fastenware, Inc.*, 354 F. Supp. 856 (N. D. Ill. 1973), an action by a former employee against his former employer seeking damages for breach of the employment contract and fraud, the court looked to Illinois choice of law rules and determined that Illinois law governed a cause of action for fraud based upon alleged fraudulent misrepresentation in an employment contract when the contract was made in Illinois and where, although the plaintiff had been hired to supervise defendant's sale activities in Illinois and "other territories", defendant's business was centered primarily in Illinois. The court based its decision upon § 148 of the Second Restatement of Conflict of Laws which provides that the rights and liabilities of the parties involved in an action based upon fraud and/or misrepresentation should be governed by the law of the state where the false representations were made. The *Wilhoite* court stated, in a footnote at page 857:

> Although the court was unable to find any Illinois decisions specifically adopted [Restatement (Second) of conflict of Laws] 148, Illinois has adopted the Second Restatement for other wrongs, *e.g.* torts. *Ingersoll* v. *Klein*, 46 Ill.2d 42, 262 N.E.2d 593 (1970). Thus, the application of the Second Restatement in this case is not only the better rule, but probably the one that the courts of Illinois will follow when given the opportunity.

Therefore, the *P. S. & E.* court concluded that Illinois would follow the "most significant contracts" approach in contract cases, and the *Wilhoite* court held that because Illinois had adopted The Second Restatement approach for torts, then it

would do so for other causes of action if given the chance. The Restatement provision here applicable is the "most significant contacts" approach:

> § 192. Life Insurance Contracts
>
> The validity of a life insurance contract issued to the insured upon his application and the rights created thereby are determined, in the absence of an effective choice of law by the insured in his application, by the local law of the state where the insured was domiciled at the time the policy was applied for, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

The very recent Illinois Supreme Court decision in *M.W.M. Trucking Co.* v. *Industrial Commission*, 62 Ill.2d 245, 342 N.E. 2d 17 (1976) is additional support for the presumption that Illinois courts would apply the "most significant contacts" doctrine to contract cases. In *M.W.M.*, the claimant, an Illinois resident, leased his truck to American, a Chicago-based trucking firm. On the date of the accident in question, the claimant hauled freight from Chicago to Granite City and then, to avoid driving back to Chicago with an empty truck, entered into a "trip lease" agreement in Missouri with M.W.M., a Missouri trucking firm, to haul lumber from Missouri to Whiting, Indiana, which is located in the Chicago area. Claimant sustained injuries in an accident which occurred in Illinois while he was driving to Whiting, Indiana, and he subsequently filed an application for the adjustment of a claim before the Illinois Industrial Commission seeking an award for his injuries. The arbitrator entered an award on behalf of the claimant and found that the borrowing employer, M.W.M., was principally liable for payment of the award and that the loaning employer, American, would be liable only if M.W.M. failed to satisfy the award. The award was reversed by the circuit court but that court's reversal was

reversed by the Illinois Supreme Court. The threshold consideration on appeal concerned the authority of the Illinois Industrial Commission to adjudicate the claimant's request for compensation. M.W.M. argued that because the trip lease agreement was made in Missouri, that the Illinois Workmen's Compensation Act was inapplicable because Illinois had no substantial connection with the relationship between M.W.M. and the claimant. However, the Illinois Supreme Court held that the Illinois Industrial Commission had jurisdiction to determine the matter:

> *M.W.M. has placed undue emphasis on the fact that the contract for hire with claimant was entered into in Missouri.* The place where the employment contract is made is the crucial jurisdictional consideration in situations where the accident occurs outside of Illinois. (*Morris* v. *Industrial Com.* (1973), 55 Ill.2d 563, 304 N.E.2d 606). This is not the situation presented in this case.
>
> The record discloses that claimant is a resident of this State and permitting jurisdiction of the Illinois compensation act to accrue to him would "promote the general welfare of the people of this State" as expressed in the title of the act. Moreover, the accident occurred in this State and M.W.M. conducted a substantial portion of its business in the Chicago area. These cumulative circumstances establish a substantial interest of this State in the employment relationship. We conclude that the Industrial Commission properly considered claimant's application for adjustment of claim. [Citation omitted.] [342 N.E.2d 22]

Jurisdictions other than Illinois have applied this "most significant contacts" approach to both tort and contract cases. See the factually similar case of *Zogg* v. *Penn Mutual Life Insurance Company*, 276 F.2d 861 (2d Cir. 1960), wherein the insured, a resident of New York, had applied for an insurance policy in Massachusetts and paid the first premium there. The policy was issued in Massachusetts and delivered to the insured by mailing it from Massachusetts to the insured's home

in New York. In *Zogg*, the court adopted a flexible choice-of-law rule which looked to the "center of gravity" of the contract and found that under the circumstances of the insured's and the beneficiary's being New York residents and the insurer being licensed to do business in New York, the "grouping of the significant contacts" required that the validity of the contract be controlled by New York law even though the insurance contract was deemed to have been made in Massachusetts. Another New York decision is *Tormey* v. *Travelers Insurance Company*, 6 A.D. 2d 21, 174 N.Y.S.2d 496 (1958), in which the insurer interpleaded two claimants of the proceeds under a group life policy. The policy had been issued in New York while the insured was employed by a New York corporation. However, the insured was subsequently transferred to his employer's New Jersey branch office, married a New Jersey resident, and executed a change of beneficiary form in New Jersey. There, New York law was applied to uphold a late change of beneficiary because "on the whole it must be said that there have been sufficient and continued contacts with New York to permit the application of New York law to the performance of the contract terms."

Also see *United Benefit Life Insurance Company* v. *Cody*, 286 F.Supp. 552 (W.D. Wash. 1968), where a life insurer brought an interpleader action against the two claimants to the policy proceeds. There, the federal district court sitting in Washington, applying Washington conflict of laws rules held that "the state with which the contract has the most significant relationship, except perhaps in the usual case of usury, will govern the validity and effect of a contract." 286 F.Supp. 553. And see *Capitol Indemnity Corp.* v. *St. Paul Fire & Marine Ins. Co.*, 357 F.Supp. 399 (W.D. Wis. 1972), where the federal court sitting in Wisconsin stated that, "The Wisconsin Supreme Court has explicitly adopted the grouping-of-contacts approach for the resolution of conflicts questions pertaining to

the rights and duties arising under a contract" and concluded, therefore, that an insurance contract, issued in Minnesota to be perfomed in both Minnesota and Wisconsin with relation to the insured whose principal office is in Minnesota, was to be governed by the law of Minnesota. 357 F. Supp. 411

In the instant case, the state of Illinois clearly has the "most significant contacts" with the claim asserted. While the life insurance policy was originally delivered and the first premium was paid in Michigan, the policy was not necessarily to be performed in Michigan. The insurer's obligation would and did follow the insured wherever he went. The insured moved from Michigan and, on July 26, 1972, residing in Illinois, changed the beneficiary of the life policy to his estate. The insured's death occurred in Illinois on August 2, 1972, and plaintiff was appointed administrator of the insured's estate by an Illinois court. The claim to the proceeds asserted by the administrator arises solely out of this Illinois change of beneficiary. In fact, the administrator, an Illinois resident with an office in Illinois, executed the documents making claim to the policy proceeds in Illinois and filed suit in Illinois. And the checks issued by the insurer to the administrator, totaling $42,573.15, were sent to him in Illinois and were deposited to the account of the insured's estate in an Illinois bank. It is clear that the insurer's obligation, despite the insured's Michigan residence at the time the life policy was executed, became one to be performed in Illinois, the residence of both the deceased insured and his estate's administrator and that Illinois, not Michigan, had the most significant contacts with the operative facts existing in the present case. And the application of Illinois law would reveal that the insured's death did not occur while he was a "passenger in or on a public conveyance" and that the district court's entry of summary judgment in the insurer's favor was proper.

III.

The Life Insurance Policy Provision "While a Passenger in or Upon a Public Conveyance Then Being Operated by a Common Carrier to Transport Passengers for Hire" is Clear and Unambiguous, and the Seventh Circuit's Holding That an Insured Hit and Killed by a Mail Freight Train Upon Which He Was Not Riding Was "a Passenger in or Upon a Public Conveyance . . ." is Erroneous Under Any State Law.

Application of Illinois law would mandate the affirmance of the district court's entry of summary judgment in the insurer's favor because the insured's death did not occur while he was a "passenger in or on a public conveyance." In *Fidelity & Casualty Co. of N.Y.* v. *Morrison*, 129 Ill.App. 360 (2d Dist. 1906), the court affirmed a judgment allowing double indemnity if the insured was riding "as a passenger in or on a public conveyance." In that case, the decedent, in attempting to board, grabbed the handrail of a moving train. While his foot was on the step of the train, he struck an iron post on the station platform, lost his grasp and fell from the train. The *Fidelity* court pointed out that the question in the case was "whether the relation of passenger arose from all the facts stated, *and* whether he [the insured] was *on the train*." (Emphasis added.) The *Fidelity* court concluded that the insured was *on* the train and that he would have remained *on* the train had he not struck the iron post.

While the factual situation here involved differs from that in the *Fidelity* case because; in *Fidelity*, the insured was physically present *in* or *on* the train when the fatal accident occurred, the language of the *Fidelity* policy is almost identical to the language in the instant case and, therefore, the *Fidelity* court's reasoning is instructive here. The *Fidelity* court found it necessary to determine whether the insured was *on* the train in addition to determining whether or not a passenger relationship had been created. Here, it is obvious that the insured was not *"in*

or *upon* any public conveyance then being operated by a common carrier to transport passengers for hire." Aside from the assured's not being physically "in or upon" the train, the train which did, in fact, cause his death was not "a common carrier to transport passengers for hire," but a mail freight train on which the insured did not intend to take passage.

Another factually distinguishable but instructive case is *Kaminsky* v. *Arthur Rubloff & Company*, 72 Ill.App.2d 68, 218 N.E.2d 860 (1st Dist. 1966), wherein the Illinois Appellate Court held that a person falling into an elevator shaft when he intended to board the elevator cab "was not a 'passenger' *on* the elevator when the accident occurred." (Emphasis added.)

Therefore, application of the appropriate Illinois law supports the district court's finding that the insured was not a passenger in or upon a public conveyance at the time he was struck and killed by a mail freight train, and the Seventh Circuit's reversal of the judgment entered in the insurer's favor is erroneous.

Even if Michigan law were applicable, the judgment of the district court was proper, and it was error for the Seventh Circuit to reverse. Although the district court found that *Quinn* v. *New York Life Insurance Company*, 224 Mich. 641, 195 N.W.2d 427 (1923), the one Michigan case referred to it by the administrator, was distinguishable, the Seventh Circuit determined that the *Quinn* case was relevant and based its reversal upon the supposed reasoning of that case, disregarding the factual differences between that case and the case at bar.

In *Quinn*, the insured was struck and killed by a taxicab while he was in the process of alighting from a streetcar. The insurance company in *Quinn* refused to pay double indemnity under the policy provision which read:

> . . . double the face of the policy, upon receipt of due proof that the death of the insured . . . was caused directly or by accident while traveling as a passenger on a streetcar, rail-

road train, steamship licensed for regular transportation of passengers, or other public conveyance operated by a common carrier.

The *Quinn* jury determined, under the instructions given by the trial judge, that the insured was still a passenger under the momentum of the moving streetcar at the time he was struck and the Michigan court entered judgment in favor of the insured.

The majority of the Seventh Circuit relied upon the *Quinn* decision as support for its holding that all that is required for recovery under the policy provision here involved is that the insured have passenger status at the time of his death. This holding disregards the specific policy language that requires not only passenger status but also that the insured be a passenger *"in or upon* a public conveyance then being operated by a common carrier to transport passengers for hire." While the *Quinn* insured was in the process of alighting from the streetcar and was found by the jury to have been "a passenger on a streetcar," the instant insured, who had passenger status because he had purchased his ticket and was waiting for the train, was not *"in or upon* a public conveyance" and was not even in the process of boarding a public conveyance. In fact, the commuter train which he intended to board had not pulled into the station prior to the accident which resulted in his death. Circuit Judge Pell points out this legal distinction between the fact situation in *Quinn* and the fact situation in the case at bar when he stated, at A.13 and A.15-16:

> . . . The *Quinn* case thus stands for nothing more than that a person is still a passenger "traveling on a streetcar" even though the vehicle itself was not moving, or traveling, along its tracks. . . .
>
> * * * * *
>
> Thus, if the law pertaining to what creates the relationship of passenger, insofar as a carrier is concerned, is to be carried over to construing an insurance contract, it is not necessary to look to the Michigan law for the law appears to be the same in practically all jurisdictions with regard

to the carrier-passenger relationship. I fail, however to discern why law, and it would appear to be salutary law, which has developed as a somewhat sui generis area of the law, would be "supposed" to have been carried over into contract law so as to distort the clear and explicit words that the passenger to be covered must be "in or upon" the conveyance.

A person who is not even in the process of "safely getting *on* a public conveyance" can by no conceivable stretch of the imagination be said to be "a passenger in or upon a public conveyance then being operated by a common carrier to transport passengers for hire." That is all that [the insured] paid for in the way of coverage and this court should not rewrite the contract. Even if we were to assume *arguendo* that the carrier law would carry over and give [the insured] the status of a passenger, he was not *"in or upon* a public conveyance then being operated by a common carrier." (Emphasis added.)

The majority of the Seventh Circuit committed a fundamental error in equating the wholly dissimilar fact situation in the *Quinn* case with the facts of the instant case and, therefore, improperly applied the *Quinn* court's dicta to the instant case. The reversal of the district court's entry of summary judgment in favor of the insurer is the result of the majority's distortion of the clear intent of unambiguous policy language and should be reviewed by this Court.

CONCLUSION.

Because of the confusion among the various states and, therefore, the federal judiciary, concerning the conflict of laws questions in life insurance litigation and because of the widespread influence any decision in the area of life insurance has over the public in general, petitioner respectfully requests of this Court that a writ of certiorari be issued to the Court of Appeals for the Seventh Circuit and that the decision of that court be reviewed herein.

Respectfully submitted.

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APPENDIX.

UNITED STATES COURT OF APPEALS,
For the Seventh Circuit.
Chicago, Illinois 60604.

January 23, 1976.

Before.

HON. JOHN PAUL STEVENS, *Circuit Justice**
HON. THOMAS E. FAIRCHILD, *Chief Judge*
HON. LUTHER M. SWYGERT, *Circuit Judge*
HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. ROBERT A. SPRECHER, *Circuit Judge*
HON. PHILIP W. TONE, *Circuit Judge*
HON. WILLIAM J. BAUER, *Circuit Judge*

BENNO P. LUDWIG, as Administrator of the Estate of DEAN E. CANE, Deceased,
Plaintiff-Appellant,
No. 75-1119 *vs.*
MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 73 C 3174

* Mr. Justice Stevens participated initially as Circuit Judge and on and after December 19, 1975 as Circuit Justice.

(Judges Pell and Bauer voted to grant said petition for rehearing *en banc*. Judge Tone disqualified himself from participation in this matter.)

ORDER.

On consideration of the petition for rehearing and suggestion that it be reheard *en banc* filed in the above-entitled cause, the majority of the panel having voted to deny rehearing and a majority of the active members of the court having voted to deny a rehearing *en banc*,

IT IS ORDERED that the petition for rehearing and the suggestion for rehearing *en banc* be, and the same are hereby Denied.

IN THE UNITED STATES COURT OF APPEALS,
For the Seventh Circuit.

No. 75-1119

BENNO P. LUDWIG, as Administrator of the Estate of DEAN E. CANE, Deceased,

Plaintiff-Appellant,

vs.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,

Defendant-Appellee.

No. 73 C 3174

FRANK J. MCGARR, *Judge*

ARGUED MAY 29, 1975—DECIDED OCTOBER 17, 1975.

Before PELL and SPRECHER, *Circuit Judges*, and EAST,* *Senior District Judge.*

EAST, *Senior District Judge.*

THE APPEAL

The plaintiff-appellant Benno P. Ludwig, as Administrator of the Estate of Dean E. Cane, deceased, (hereinafter for convenience referred to as Cane) appeals from an adverse summary judgment denying his claim for double the amount of accidental death benefits under a life insurance policy (policy) issued by the defendant-appellee Massachusetts Mutual Life Insurance Company (hereinafter for convenience referred to as Insurer). We reverse and remand.

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* Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

FACTS

The undisputed facts are:

Cane then a resident of the state of Michigan and within that state applied to the Insurer for the policy on August 27, 1970, which policy was finally made, delivered, and became effective within Michigan on October 27, 1970. Thereafter and prior to July 26, 1972, Cane changed his residence to the state of Illinois and on that date made a change of beneficiary under the policy to his estate.

On the following August 2, while still a resident of Illinois and while the policy was in force and effect, Cane purchased a Burlington Northern Railroad commuter passenger ticket from Lisle, Illinois to Chicago, Illinois. He entered the railroad station in Lisle with the intention of boarding the appropriate train. As he attempted to cross the tracks to reach the proper location for his eastbound commuter train, he was struck and killed by a westbound mail freight train proceeding through the station area. The commuter train had not yet arrived in the station at the time of the accident.

The Insurer had paid the estate the ordinary death benefits as provided in the policy and an additional $20,000 accidental death benefits, but had denied further liability for double benefits as provided in the accidental death benefit agreement provisions of the policy (hereinafter for convenience referred to as accidental provision). The accidental provision in its pertinent parts reads:

> "If such death was the result of an injury sustained while the insured was a passenger in or upon a public conveyance then being operated by a common carrier to transport passengers for hire the amount which otherwise may be payable under this agreement [$20,000] will be doubled."

PROCEEDINGS IN THE DISTRICT COURT

Cane asserted and the District Court agreed under the command of *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941), and *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), that the conflict of law doctrine and rule of the forum, the State of Illinois, determined whether the laws of the State of Illinois or the State of Michigan governed the rights and duties of the parties under the policy. Cane urged and the District Court concluded under the Illinois law that the interpretation and construction of the policy and its disputed accidental provision specifically must be governed by the laws of the place of making, namely: the State of Michigan, citing as authority *Gray* v. *Penn Mutual Life Insurance Co. of Philadelphia*, 5 Ill. App. 2d 541, 126 N.E.2d 409 (1955), and *Hartliep Transit Co.* v. *Central Mut. Ins. Co.*, 288 Ill. App. 140, 5 N.E.2d 879 (1936). *Gray* at 413, quoting *Hartliep*, states:

> "The general rule is that a contract of insurance is deemed to be executed at the place where the last act is done which is necessary to make the same binding upon the parties [here the payment of the first premium] . . . Another general rule in the construction of contracts in matters affecting their validity and the rights of the parties is that they are *governed by the law of the place where the contract is made, at the time of the making thereof, and that such law is as much a part of the contract as if incorporated therein* This rule prevails in the absence of any agreement of the parties to the contrary. *Gaston, Williams & Wigmore of Canada* v. *Warner*, 260 U.S. 201 [1922]." (Italics supplied).

Cane claims recovery on the accidental provision under the holdings of the Supreme Court of Michigan as delineated in the following cases: *Quinn* v. *New York Life Ins. Co.*, 224 Mich. 641, 195 N.W. 427 (1923) [hereinafter cited as *Quinn*]; *Spangler* v. *Saginaw Valley Traction Co.*, 152 Mich. 405, 116 N.W. 373 (1908); *Rice* v. *Michigan Ry.*, 208 Mich. 123, 175

N.W. 454 (1919) [hereinafter cited as Rice]; *Moffit* v. *Grand Rapids Ry.*, 228 Mich. 349, 200 N.W. 274 (1924) [hereinafter cited as *Moffit*]; *Wilson* v. *Detroit United Ry.*, 167 Mich. 107, 132 N.W. 762 (1911) [hereinafter cited as *Wilson*]; and the federal case of *Preferred Acc. Ins. Co. of New York* v. *Ladd*, 299 F. 562 (6th Cir. 1924).

The Insurer, acknowledging the undisputed facts, asserted, first, that under the rationale of *Ingersoll* v. *Klein*, 46 Ill. 2d 42, 262 N.E.2d 593 (1970) [hereinafter cited as *Ingersoll*], as extended by *P. S. & E., Inc.* v. *Selastomer Detroit, Inc.*, 470 F.2d 125 (7th Cir. 1972) [hereinafter cited as *P. S. & E.*], the law of Illinois governs the rights and duties of the parties under the policy;[1] and secondly asserted non-liability under the laws of either state.

The District Court noted that the Michigan Supreme Court in *Quinn* had concluded that the word "on" appearing in the language of the accidental provision reading " 'while traveling as a passenger on a streetcar. . . .' did not necessarily mean physically 'on' the streetcar"; however, the District Court thought "[t]he basic problem in the instant case [to be] somewhat dif-

1. Insurer is content with the District Court's analysis and reading of the Michigan law as dictating the grant of the summary judgment in its favor; however, asserts that the District Court in the first instance erred in considering Michigan law as guiding the interpretation and construction of the insurance contract provisions in lieu of the law of the State of Illinois. Insurer cites *Ingersoll* at 49 and *P. S. & E.*, at 127 as establishing the Illinois' conflict of laws doctrine which directs the selection of the state holding the "most significant contacts" in the relationship among the parties as the state whose law should govern the substantive contractual rights and duties of the parties.

We note that the District Court fully considered that contention and flatly rejected it. Insurer does not cross appeal on any assertion of error, so we do not reach the issue nor express any opinion on the effect of the tort claim conflicts of law doctrine enunciated in *Ingersoll* and considered in *P. S. & E.* We adopt the District Court's conclusion to apply the law of Michigan as the law of this case. The District Court aptly distinguished the facts in *P. S. & E.* from those of this case which conclusively establish the place of making the policy and rightfully, we believe, concluded *P. S. & E.* to be inapposite.

ferent," and "focus[ed] on the [accidental provision] words 'in or upon a public conveyance then being operated' " and concluded "that the use of the phrase 'in or upon' restricts the definition of 'public conveyance' [as used in the policy] to the actual car or boat used for moving the passengers. Thus where the passenger has not yet entered his train and is merely crossing the railroad tracks, he is not yet 'in or upon' a 'public conveyance'. This precludes the liability under the policy urged by [Cane]."

DISCUSSION

We conclude that the District Court erred in concluding to give or brand the phrase "in or upon a public conveyance" with the narrow and restricted interpretation and meaning to be in or upon "the actual car or boat used for moving" a passenger and thereupon granting the summary judgment. The ruling is in direct conflict with the rationale and holding in *Quinn* and cannot stand.

The District Court ignored *Quinn's* expressly stated Michigan rule or test in determining the mutually intended meaning of the common carrier-passenger status ("while the insured was a passenger") required under the accidental provision and in lieu thereof concluded it was "obvious [that] the language in the [accidental provision] is somewhat different from that in the [*Quinn* policy and the] factual situation in the two cases are quite substantially different." The District Court having thus, we believe, mistakenly swept away *Quinn* "sought assistance from other courts which have faced similar problems to reach its decision," and ill-advisedly selected *London Guarantee & Accident Company* v. *Ladd*, 299 F. 562 (6th Cir. 1924) [hereinafter cited as *London*] as its guide.

The insurance coverage in *London* read: Double benefits will be paid "if such injuries are sustained while riding as a passenger . . . [in a passenger elevator]." At 563. The insured's death "came [about] from falling down an elevator shaft in the Gar-

field Apartments. . . . There were no eyewitnesses of the accident, but, as the insured was found in the bottom of the shaft in the basement, the carriage found standing at the second floor, and the door of the shaft on the first floor found to be open, it would seem that he must have walked through the door on the first floor into the open elevator shaft." At 564. The court held that "the meaning of the expression 'while riding,' the term 'passenger elevator,' as here used, cannot be held, in [its] judgment, to refer to more than the car or carriage," and denied double indemnity liability under the policy since it was "clear that the insured never entered the car itself." At 565.

The District Court drew from its comparison of the wording of the *London* coverage with that in the Cane accidental death provision the definition and meaning of the Cane phrase "in or upon" as above stated, and following *London,* denied liability.

We are not able, as was the District Court, to discern any material difference in the wording of the *Quinn* and Cane accidental death provisions, respectively. Each of the provisions grant coverage to the respective insured "while . . . a passenger on [in or upon] a public conveyance." The placing of any material difference in the meaning of the prepositions "on" or "in or upon" would be rooted in a mere quarrel with words and most unrealistic. If we were restricted to a comparison of policy language for disposition of Cane's claim, we would liken the Cane coverage to that in *Preferred Acc. Inc. Co., supra,* the companion case to *London,* which allowed coverage.

However, and in any event, we are satisfied that making a comparison of the language of the two coverages to reach the meaning and definition of the Cane insurance coverage is beside the point and traveling on the wrong track.

We conclude the insured's apartment house *elevator-passenger status* involved in *London* and its companion case to be inapposite to the Cane *common carrier-passenger status*

involved in this case, which is all that is required under *Quinn.*

We turn our discussion to the ultimate rationale and holding developed and enunciated in *Quinn.* There the insured was struck and killed by a taxicab while he was in the process of alighting from the streetcar to the public street. The only material factual difference between the common carrier-passenger status of Quinn and Cane, respectively, was that Quinn was engaged in getting safely *off* and Cane in getting safely *on* a public conveyance, a difference without legal consequences. The jury in *Quinn,* under the court's instructions geared to the Michigan law of public carrier-passenger rights and duties, faced the factual query as to whether Quinn was at the time he was struck a passenger then under the momentum of the moving streetcar or a traveler under his own power on the street or highway, and resolved the same in Quinn's favor as then being a passenger on the streetcar. It is important to note that the instruction did not require the jury to find that Quinn was physically "on" the streetcar per the language of the coverage.

The main concern of the Supreme Court in *Quinn* was the insurer's contention that, as between a passenger and the passenger's insurer, a different rule should be applied than between the passenger and the carrier on the question of whether the insured was a passenger at the moment he was struck. The Supreme Court definitely rejected the contention and held the defendant insurance company bound to the same standards and tests for determining the existence of the insurance-passenger status as imposed upon the streetcar company or operator of other public conveyances in determining the common carrier-passenger status. The Supreme Court, having thus bound the insurance company to the carrier-passenger relationship test imposed upon the carrier, turned its attention to the question as to when the relationship of carrier-passenger on a streetcar terminates. That question was posed to the opposite pole from Cane's stance and beyond our

inquiry, as we are interested in the question as to when the relationship of carrier-passenger begins or commences under the Michigan law.

The important teaching to us from *Quinn* is the Supreme Court's enunciation of Michigan law, at 428:

> "At the time the provision, 'while traveling as a passenger on a [public conveyance]' was adopted by [the Insurer] and made a part of its contract, that phrase had well-understood meaning in the law, and it is reasonable to suppose that the meaning given to it by the courts was well understood and considered by [the Insurer] before making it a part of [the accidental provision], and it was well known by both parties when the contract was made that, should the parties afterwards disagree upon the question of liability, *the courts would probably give the language the same construction they had given it in cases where transportation companies were defendants.*" (Italics supplied).

Counsel has cited *Rice*, and our independent search reveals no other authority, for the Michigan rule of determining the beginning or commencement of the carrier-passenger relationship. The factual picture in *Rice* showed Rice standing on the platform in front of the waiting room with the then intention of boarding an expected streetcar. At that loading point, it was customary that the streetcars would stop for passengers on being signaled. As a streetcar approached, Rice signaled it to stop by waving his arms. However, the car did not stop and sped by at a high rate of speed causing Rice in some way by the suction of air to be thrown against the building and injured.

The Supreme Court of Michigan in *Rice* for the first time answered the question when Rice was constructively a passenger and the defendant owed him a duty as such as follows:

> " 'The relation of carrier and passenger commences when a person with the good-faith intention of taking passage, and with the express or implied consent of the carrier, places himself in a situation to avail himself of the facilities for transportation which the carrier offers. In case of a railroad this relation arises not merely when the passenger enters the train with the ticket already purchased, giving him a contract right to ride, but when he enters upon the premises of the carrier, with intention to take a train in due course. . . . Those who by express or implied assent are waiting in the passenger room . . . *or are crossing the premises of the carrier for the purpose of going upon a train, or* are in the act of mounting the car steps, are passengers, provided their acts are such as are presumed to be known and assented to by the agents of the railroad company having authority in the matter, and regardless of whether or not a ticket has been purchased, if no rule or regulation of the company is being violated." (Italics supplied). At 458.

We have been cited *Moffit* wherein the Supreme Court of Michigan citing *Wilson* reiterates the rule in Michigan that the relationship of carrier-passenger continues after a passenger leaves one car and traverses other areas in order to transfer to another car through the following conclusion at page 275:

> "[T]he weight of authority in this country is to the effect that the relation of passenger and carrier continues while the passenger is transferring from one car to another, he having been furnished a ticket enabling him to do so, when a transfer from one street car to another is part of a continuous trip. [Citing numerous authorities]."

The trilogy of *Rice* at the beginning of the travel, *Moffit* during the travel, and *Quinn* at the termination of the travel inescapably removes the necessity of a passenger to be "in or upon" the actual car or boat moving the passenger in order to establish or maintain the carrier-passenger relationship. Like the Michigan court in *Quinn*, we "suppose" the Insurer "well understood and considered" the quoted rationale and holding of *Rice*, *Moffit*, and later *Quinn* as fixing the meaning of while the insured was a passenger in or upon a public conveyance" before making that law "a part of its contract."

We conclude that *Quinn* dictates that the *Rice* rule and test of common carrier-passenger status be applied in determining the commencement of the passenger status of Cane under the accidental provision.

The summary judgment entered by the District Court is reversed and the cause remanded for further proceedings consistent herewith.

REVERSED AND REMANDED.

PELL, *Circuit Judge*, dissenting.

Dean Cane contracted and paid for insurance coverage in the event his death occurrred while he "was a passenger *in or upon a public conveyance* then being operated by a common carrier to transport passengers." (Emphasis added.) While upon railroad premises, Cane crossed tracks to get to a platform where he could board his commuter train which had not yet arrived. While moving across the tracks he was struck and killed not by the train he eventually intended to board but by a freight train.

Upon these simple and undisputed facts in this diversity case, I cannot conceive that the courts of Michigan would hold that Cane had the coverage in issue. I therefore respectfully dissent.

I agree with the majority opinion that the law of Michigan controls in the present case but disagree with that opinion insofar as it expresses that the law of that state requires the tortured construction of plain words at which the majority have arrived. A careful reading of *Quinn* v. *New York Life Ins. Co.*, 224 Mich. 641, 195 N.W. 427 (1923), and *Rice* v. *Michigan Ry. Co.*, 208 Mich. 405, 116 N.W. 373 (1908), shows that the holding in each of these cases fails to support a holding of coverage in the present case. The crucial words in *Quinn* were "while traveling as a passenger *on* a street car." (Emphasis added.) In that case, the decedent had been riding on a street

car and was in the process of dismounting. The court made it clear that, if the dismounting had been completed, there would have been no coverage:

> "The question, therefore, is whether Mr. Quinn had safely alighted on the pavement at the moment he was struck by the taxicab. If he had, he was a traveler upon the highway, and no longer a passenger. If he were in the act of alighting, or had not safely alighted, from the car when he was struck by the automobile, he was a passenger within the meaning of this rule." 195 N.W. at 429.

The Michigan court then reviewed the testimony and concluded:

> "We are inclined to the opinion that the testimony of these two witnesses would justify an inference by the jury that Quinn was struck while in the act of alighting, and before he had safely alighted onto the pavement." *Id.* at 429.

Upon this basis, the judgment of the trial court holding that there was coverage under the particular policy was affirmed. The *Quinn* case thus stands for nothing more than that a person is still a passenger "traveling on a street car" even though the vehicle itself was not moving, or traveling, along its tracks. He was "on" the conveyance physically and actually. The court did quote generally from 4 Ruling Case Law 1407 with regard to the duty owed by common carriers to its passengers with regard to safety where the carrier has exclusive control of its tracks and stations.

The duty of care owed by a common carrier to its passengers, actual or prospective, would seem to have little bearing on the construction of an insurance contract relating to a passenger "in or upon a public conveyance," yet the law concerning the common carrier's general duty of care owed to the traveling public was all that was involved in *Rice*. That was a negligence case against a common carrier and concerned a plaintiff injured while on the carrier's station platform.

> "He knew that a through car on defendant's line would pass there about that hour, and that it would stop for passengers on being signaled. It is his claim that as the car approached the crossing from the south, and when about 35 rods distant, he signaled it to stop by waving his arm; that the car did not stop, but passed by at a speed of from 50 to 60 miles per hour; that, expecting it to slacken and stop, he stood near the edge of the platform and was caught in some way by the suction of air, thrown against the building and then the car, and badly injured." 175 N.W. at 455.

In *Rice,* while the plaintiff had not boarded the moving car he obviously was injured according to the jury's verdict by the negligent operation of the vehicle on which he was an intended passenger. Of course, in the case before us, the vehicle which the decedent intended to board had not arrived at the station yet, indeed as far as the record shows was no place within sight. That, however, insofar as the duty of care owed by a carrier to both passengers and intended passengers, as will be discussed hereinafter, is immaterial.

One issue as stated by the Michigan court was whether "the plaintiff [was] *constructively* a passenger and did the defendant owe him a duty as such?" *Id.* at 458. (Emphasis added.) The court in concluding that the relationship of a passenger was established under the law pertaining to carriers then quoted from 6 Cyc. 536. [6 Encyclopedia of Law and Procedure) The quotation from *Rice* in the majority opinion is not of the words of the Michigan Supreme Court but rather is a part of that court's quotation from Cyc. This is not, as the majority opinion suggests, the court's answering "for the first time" when a person in the position of Rice is constructively a passenger insofar as a duty is owed to him by his intended carrier. The carrier law quoted from Cyc. is in a volume published in 1903, 16 years before the *Rice* opinion. It does not purport to state law applicable to carriers which is peculiar to Michigan but instead deals with law of general application. This law pertaining to carriers was not new in 1919 and indeed is still the law. Thus, in the

second successor work to Cyc., Corpus Juris Secundum, it is stated:

> "A person who, with the bona fide intention of becoming a passenger and with the express or implied assent of the carrier, enters on the carrier's premises, at a proper place, in a proper manner, and at a proper time, ordinarily, has the status of a passenger, even before entering the carrier's vehicle." 13 C.J.S. Carrier § 556 at 1061 et seq.

Among other cases cited in the cumulative pocket part to that volume is *Ketchum* v. *Denver & Rio Grande Western R. Co.,* 175 F.2d 69 (10th Cir. 1949), which states the law pertaining to carriers, not as the law of a particular state, but as general law:

> "The relation of carrier and passenger arises, and the duty of the carrier to the passenger attaches, when the latter enters the station premises for the purpose of boarding a train of the carrier. Such relationship precedes the actual boarding of the train and comes into being when a person, with the consent of the carrier, express or implied, enters the appropriate premises of the Railroad Company with the bona fide intent to avail himself of the transportation facilities which the carrier offers." (Footnote omitted.) 175 F.2d at 71.

Thus, if the law pertaining to what creates the relationship of passenger, insofar as a carrier is concerned, is to be carried over to construing an insurance contract, it is not necessary to look to the Michigan law for the law appears to be the same in practically all jurisdictions with regard to the carrier-passenger relationship. I fail, however, to discern why law, and it would appear to be salutary law, which has developed as a somewhat sui generis area of the law, would be "supposed" to have been carried over into contract law so as to distort the clear and explicit words that the passenger be covered must be "in or upon" the conveyance.

A person who is not even in the process of "safely getting *on* a public conveyance" can by no conceivable stretch of the imagination be said to be "a passenger in or upon a public

conveyance then being operated by a common carrier to transport passengers for hire." That is all that Cane paid for in the way of coverage and this court should not rewrite the contract. Even if we were to assume *arguendo* that the carrier law would carry over and give Cane the status of a passenger, he was not "*in or upon* a public conveyance then being operated by a common carrier." (Emphasis added.)

The words "in or upon," as used in an accident policy, should consistently with general principles applicable to insurance policies be given a broad and liberal construction consistent with the context of the whole clause in which they appear but where there is no ambiguity, the language must be considered in its plain and easily understood sense. 10 Couch on Insurance 2d § 41:289 at 282 (1962). The Couch text (see also §§ 41:254, 255, 261, and 262) indicates that the terms are given their ordinary meaning in connection not only with automobiles but with other conveyances; however, the cases in the insurance field where "in or upon" or equivalent expressions have been used all involve some contact with the conveyance upon which passage is contemplated. Thus, cases have involved one riding in places other than those customarily devoted to passengers, such as the platform of a passenger car or its steps, or in the case of an automobile, the running board. Even the cases where there has been some physical contact with the intended conveyance have gone both ways. Here, of course, there was no relationship whatsoever with being "in or upon" the intended conveyance. The result here should be based upon the plain and easily understood sense of the words used.

In sum, even if Cane could be considered in law as a "passenger," he was not at the time of his accidental death "in or upon a public conveyance then being operated by a common carrier to transport passengers."

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

BENNO P. LUDWIG, as Administrator of the Estate of Dean E. Cane, Deceased,
Plaintiff,
vs.
MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Defendant.
No. 73 C 3174

MEMORANDUM OPINION AND ORDER

This is a suit brought by the the estate of an insured against his life insurance company upon the company's refusal to pay, pursuant to a "double indemnity" clause in the policy. The defendant, Massachusetts Mutual Life Insurance Company, has moved for summary judgment.

The insured, Dean E. Cane, applied for the life insurance policy in question on August 27, 1970. The policy indicates that at the time of the application, he was a resident of the State of Michigan. Furthermore, the insurance policy contains a clause which provides that the policy is not effective until the policy has been issued and delivered, and the first premium paid. The policy was issued on October 19, 1970. The first premium was paid on or about October 27, 1970. There does not seem to be any dispute in the record that Mr. Cane was a resident of Michigan on these dates or that the policy was delivered there.

Sometime subsequent to the payment of the first premium and before July 26, 1972, Mr. Cane moved to Illinois. While residing in Illinois, on or about July 26, 1972, he changed the beneficiary to his estate, the plaintiff in the instant suit.

On August 2, 1972, while still a resident of Illinois, Mr. Cane was killed by a train. He had purchased a ticket and entered the station of the Burlington Northern Railroad in Lisle, Illinois. As he attempted to cross the tracks to reach the proper boarding location for his commuter train, he was struck and killed by a mail freight train proceeding through the station area. The commuter train had not yet arrived in the station at the time of the accident.

The defendant, Massachusetts Mutual, has paid a total of $42,473.15 to the plaintiff beneficiary of the insurance policy. This amount includes the face amount of the policy, $20,000, and an additional $20,000, paid pursuant to the Accidental Death Benefit Agreement provision in the policy. Within the Accidental Death Benefit Agreement is a provision stating:

> "If such death was the result of an injury sustained while the insured was a passenger in or upon a public conveyance then being operated by a common carrier to transport passengers for hire the amount which otherwise may be payable under this agreement will be doubled."

The plaintiff contends that he is owed an additional $20,000 under this clause of the policy. The defendant disagrees.

The disagreement here centers around the phrase, ". . . while the insured was a passenger in or upon a public conveyance. . . ." The plaintiff argues that Michigan law should govern the construction to be given this phrase, the defendant that Illinois law is determinative. The Federal courts, when deciding questions of conflict of laws, must follow the rules prevailing in the states in which they sit. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938). Therefore, this Court must look to the Illinois conflict of laws rules in determining which state's laws to apply in interpreting the insurance policy here in question.

Under Illinois law, the law of the place of performance governs the construction and obligations of the contract when the place of making and place of performance differ, if the agreement is to be wholly performed in a single jurisdiction. If more than

one place of performance is involved, the place of making of the contract governs its construction and obligations. *P. S. & E., Inc.* v. *Selastomer Detroit, Inc.*, 470 F.2d 125, 127 (7th Cir. 1972). In the cases involving insurance contracts, where the place of performance is not generally specified, the rule has been stated as follows:

> "The general rule is that a contract of insurance is deemed to be executed at the place where the last act is done which is necessary to make the same binding upon the parties, and if the policy does not become binding until countersigned by the authorized agent at the place of delivery, or not binding until delivery to the assured, the place of delivery is considered the place of the contract. [citations] Another general rule in the construction of contracts in matters affecting their validity and the rights of the parties is that they are governed by the law of the place where the contract is made, at the time of the making thereof, and that such law is as much a part of the contract as if incorporated therein."
>
> *Harthip Transit Co.* v. *Central Mut. Ins. Co.*, 288 Ill. App. 140 (1937)

The defendant urges the Court to apply the "most significant relationships" rule in the instant case. This rule has recently been applied by the Illinois Supreme Court in a tort case. *Ingersoll* v. *Klein*, 46 Ill. 2d 42 (1970). The Court of Appeals for this Circuit applied the rule in a contract case basing its decision to do so on the Illinois Court's approval of the rule in *Ingersoll*. *P. S. & E., Inc.* v. *Selastomer Detroit, Inc., supra. P. S. & E.*, however, involved a situation where the place of making of the contract was arguably in either Michigan or Illinois and performance was to occur in several states. Faced with this problem, the Court concluded that the Illinois Courts would probably use the "most significant relationships" test if faced with the same problem. Since this problem is not present here, it is the conclusion of this Court that we must use the traditional "place of making" test in the instant case. It is indisputable that the

contract was made in Michigan and, therefore, Michigan law will control.

The Michigan Supreme Court long ago ruled that "[a person] traveling as a passenger on a streetcar", as stated in a life insurance policy, means the same thing as "passenger", as that term is used in determining the liability of common carriers to persons injured.

> ". . . We are unable to see why any distinction should be made between the insurance company as a defendant and the streetcar company. At the time the provision, 'while traveling as a passenger on a streetcar, etc.' was adopted by defendant and made a part of its contract, that phrase had well-understood meaning in the law, and it is reasonable to suppose that the meaning given to it by the courts was well understood and considered by defendant before making it a part of its double liability, and it was well known by both parties when the contract was made that, should the parties afterward disagree upon the question of liability, the courts would probably give the language the same construction they had given it in cases where transportation companies were defendants."
> *Quinn* v. *New York Life Ins. Co.*, 195 N.W. 427 (Mich. S.Ct. 1923)

The Court then held that the insured was covered under the policy although he may not have been physically "on" the streetcar at the time of the accident. Thus "traveling as a passenger on a streetcar", as used in insurance policies, is a term of art used to indicate the status of a person as a passenger".

The *Quinn* case is the only Michigan law the Court has been referred to or able to find. As is obvious, the language in the policy involved in the instant case is somewhat different from that in the policy in the *Quinn* case. The factual situations in the two cases are quite substantially different. Therefore, this Court is required to rely upon reason and logic, with some assistance from other Courts which have faced similar problems, to reach its decision in this cause.

In *Quinn*, the plaintiff was getting off a streetcar when he was struck and killed by a taxi. There was an issue of fact in the trial as to whether the plaintiff had completed the act of getting off or whether he was in the process of doing same when he was hit. The Court instructed the jury, in effect, that they should find liability if the plaintiff had not completed the act of alighting from the streetcar, the criterion being that he be walking or running under his own power instead of being carried forward by the momentum generated by the streetcar before he touched the ground. Thus the jury could have found liability although the plaintiff was not physically "on" the streetcar.

The Supreme Court of Michigan approved this instruction, basing its decision on the rationale stated previously. The focus of the decision was on the words "while traveling as a passenger on . . ." There was no question but what the streetcar was a "streetcar" and hence within the terms of the policy. The Court concluded that the word "on" did not necessarily mean physically "on" the streetcar.

The basic problem in the instant case is somewhat different. This Court must necessarily focus on the words "in or upon a public conveyance then being operated". In this case, the insured is concedely a passenger, a fact in dispute in the *Quinn* case. The plaintiff has cited a Federal case arising in Michigan in support of his position that the language in question here is ambiguous. *London Guarantee & Accident Co.* v. *Ladd*, 299 F. 562 (6th Cir. 1924). This case is more clearly analogous to the instant suit. Two cases involving elevator accidents were consolidated. In one case, an insurance policy provided double indemnity where death occurred "while riding as a passenger . . ." in a passenger elevator". In the other, the policy provided double indemnity where death occurred "while a passenger and . . . within a passenger elevator". In both cases, the insured was killed when he entered an open elevator shaft while the elevator was on another floor.

The Court focussed on the term "elevator" as used in the two policies. It held that there was no liability incurred by the insurance company where the language included "while riding as a passenger" since "riding" restricted the meaning of "elevator" to the cab thereof. In the other case, the Court found liability since the definition of "elevator" can apply to the entire mechanical structure.

In the instant suit, the question is whether the insured was killed while in or upon a "public conveyance". This Court must conclude that the use of the phrase "in or upon" restricts the definition of "public conveyance" to the actual car or boat used for moving the passengers. Thus where the passenger has not yet entered his train and is merely crossing the railroad tracks, he is not yet "in or upon" a "public conveyance". This precludes the liability under the policy urged by the plaintiff.

In order to grant a motion for summary judgment, the Court must be convinced that there exists ". . . no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . ." Rule 56 (c), F.R.C.P. There is no material issue of fact, and the Court is convinced that the defendant is entitled to judgment as a matter of law. Accordingly, defendant's motion for summary judgment is granted.

ENTER:

/s/ FRANK J. MCGARR
United States District Judge

Dated: October 8, 1974